No. 94-1646

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

ROBERT V. O'CONNOR,

Petitioner,

against

REHABILITATION SUPPORT SERVICES, INC.
and JOHN F. HUDACS, as Commissioner of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether, under the First Amendment, an employee's unjustified and willful violation of a reasonable policy of a non-governmental employer, prohibiting the release of employer-related information to the media without authorization, may be found to be "misconduct" disqualifying the employee from the receipt of unemployment insurance benefits?

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Brief in Opposition to Petition for Writ of Certiorari

Statement of the Case

Rehabilitation Support Services, Inc. ("RSS" or "Employer") is a not-for-profit corporation which contracts with New York State to provide services to the mentally disabled. Robert V. O'Connor ("O'Connor" or "Claimant") was a direct care staff worker employed by RSS, who was dissatisfied with his "low salary" (A. 7)[1]. He was discharged for knowing and unjustified violation of his Employer's media communications policy.

RSS services the mentally ill population in ten counties throughout New York State and has serious concerns regarding stigmatizing its clients and adverse community reaction to them. RSS has established policies requiring that all media statements be made only by authorized personnel and prohibiting the unauthorized release of statements or stories to the media, as well as policies enforcing confidentiality as to its clients and programs. These policies are contained in the "Employee Handbook" which is provided to all RSS employees. That handbook also sets forth an internal grievance procedure.

On May 15, 1991, the second page of a letter from O'Connor, which noted it was being sent to a news reporter, was found in

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[1]References designated A. are to the Petitioner's Appendix.

the Employer's photocopier. This letter talked about three clients having been killed by their roommates in the last year and suggested that high staff turnover due to job dissatisfaction and low client staff ratio were problems (A. 3).[2]

RSS promptly contacted O'Connor to investigate this matter. O'Connor's immediate reaction was "oops." O'Connor admitted to his Employer (and, subsequently, on this claim for unemployment insurance) that he knowingly violated the RSS policy regarding media statements. O'Connor declined to provide any information regarding the first page of the letter, including to whom it was addressed (A. 7). He was suspended pending further investigation and, upon declining a further opportunity to explain his actions, he was discharged for his knowing violation of his Employer's policy (A. 7).

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[2] The text of the second page read as follows:

"There have been three RSS clients murdered last year. In each case the client was killed by his fellow RSS roommate. It is impossible to say why this happened but it is clear to us that high staff turnover due to job dissatisfaction and low client/staff ratio is devastating to the client's treatment.

Please feel free to write or call if you have any questions.

Sincerely,
Robert V. O'Connor
169 Elk Street
Albany, New York 12210
(518) 427-8280

cc: Mike Gormley, Times Union
News Plaza
Box 1500A
Albany, New York 12212

O'Connor knew at the time he sent the letter to the news media that the deaths of three clients had been investigated by three agencies (the New York State Office of Mental Health, the Commission on Quality Care and the Albany Police Department), and that the agencies had found that the murders could not have been prevented, and that the staff acted appropriately and in a caring manner. The Administrative Law Judge who initially heard O'Connor's claim for unemployment insurance benefits specifically found that:

> "Such health service agencies had investigated the deaths of the three clients and not attributed fault to the Employer. Claimant was especially concerned about his low salary" (A. 7).

O'Connor likewise knew that RSS' staffing ratios are dictated by the New York State Office of Mental Health and that RSS meets or exceeds the prescribed staffing ratios.

O'Connor acknowledged that he did *not* use the prescribed internal means of raising concerns regarding RSS' functioning. His failure to utilize the grievance procedures was confirmed by the consultant who investigated this matter for the Employer.

The Local Office rendered its Initial Determination on June 17, 1991:

> "You violated your company's policy regarding media statements. You were aware of this policy. Though you thought you were justified, your actions were detrimental to your Employer. Violation of a company's employment policy of which you were aware is

> considered misconduct within the meaning of the Unemployment Insurance Law." (A. 9).

The Administrative Law Judge on September 4, 1991 rendered his decision, sustaining the Initial Determination:

> "The credible evidence indicates that the claimant knowingly violated a reasonable policy of the Employer, not to release agency-related information to the media without authorization. Claimant contends that he was a "whistle blower" and thus, his actions were justified. On the record herein, I conclude that claimant's knowing violation of his Employer's policy was not so justified. Accordingly, his actions constitute misconduct under the Unemployment Insurance Law." (A. 7-8).

On appeal to the Unemployment Insurance Appeal Board, Claimant O'Connor understandably did *not* press the contention that he was a "whistle blower" within the meaning of Section 740 of the New York Labor Law. He never alleged any violation of a law, rule or regulation; he never made any internal effort to afford his Employer a reasonable opportunity to correct the activity, policy or practice with which he professed to be concerned; and he never demonstrated that there was substantial and specific damage to the public health or safety from a violation of law, rule or regulation (N.Y. Labor Law, §740[2][a] [McKinney 1988]). Instead, the Claimant shifted to a "public policy" argument that he is entitled to a "First Amendment" exception to the established rule that a knowing violation of a reasonable employer policy is conduct detrimental to the interests of the Employer constituting

misconduct within the meaning of New York Labor Law §593(3).

By decision mailed and filed June 23, 1993, the Unemployment Insurance Appeal Board ruled as follows:

> "We have reviewed the entire record and have considered the testimony and the evidence. The findings of fact and the opinion of the Administrative Law Judge are fully supported by the record. It appears that no errors of fact or law have been made. We, therefore, adopt the findings of fact and the opinion of the Administrative Law Judge as the findings of fact and the opinion of the Board." (A. 5).

Claimant appealed to the Appellate Division, Third Department of the New York State Supreme Court. The Appellate Division ruled:

> "The Board found that claimant, a psychiatric rehabilitation specialist, knowingly violated the employer's policy prohibiting the release of employer-related information to the media without authorization. The Board also found that the policy was reasonable and that claimant's knowing violation was not justified. Accordingly, the Board ruled that claimant's actions constituted misconduct disqualifying him from receiving unemployment insurance benefits. Insofar as the Board's decision is supported by substantial evidence, it must be upheld. Claimant's remaining contentions on this appeal have been considered and rejected for lack of merit." (A. 3).

O'Connor moved for permission to appeal to the New York Court of Appeals. The Court of Appeals ruled:

> "Appeal dismissed without costs, by the Court *sua sponte,* upon the grounds that no substantial constitutional question is directly involved." (A. 1).

Summary of Argument

This case involves affirmed findings of fact that O'Connor unjustifiably violated a reasonable employer policy. This misconduct disqualified his claim for unemployment insurance benefits against his private sector employer. The knowing violation of a reasonable employer policy is disqualifying misconduct and does not raise a genuine First Amendment issue.

REASONS FOR DENYING THE PETITION

I. No Constitutional Question is Presented

It is well established that misconduct under New York's Labor Law is a factual question which, where supported by substantial evidence, will be affirmed (*see, e.g. Matter of Norman [Ross]*, 53 A.D.2d 950 [3d Dept. 1976]). On this record it is established that O'Connor (1) knowingly violated (2) a reasonable employer policy (3) of which he was aware and (4) such conduct was detriment to the interests of his employer. This is misconduct within the meaning of Labor Law §593(3).

Pursuant to Labor Law §623, a decision of the Appeal Board shall be final on all questions of fact. The following facts, *inter alia*, are established:

1. The Employer's policy (providing that employees are not to give statements concerning RSS to the media unless authorized by agency management personnel) was reasonable.

2. O'Connor knowingly violated this reasonable policy.

3. O'Connor's knowing violation of the RSS policy was not justified (A. 7-8).

In accepting employment, O'Connor committed himself to abide by reasonable employer policies. The instant case is simply an example of a claimant's knowing violation of reasonable employment rules, which constitutes disqualifying misconduct (*see, e.g. Matter of Fisher [Roberts]*, 138 A.D.2d 912, 913 [3d Dept. 1988]).

The instant case rests upon an independent and adequate state law ground: the conclusive factual determination of disqualifying employee misconduct (N.Y. Labor Law, §§593[3], 623). The New York Court of Appeals correctly recognized that no substantial constitutional issue was involved here (A. 1).

II. Settled First Amendment Principles Are Controlling In Any Event

The First Amendment applies by its terms to governmental regulation of free speech, not private employer enforcement of reasonable work-place rules. Even in the governmental sector, it is recognized that as an employer, the government can adopt and enforce reasonable employment policies regarding employee statements that detract from the agency's effective operation, without fear of liability (*Waters v. Churchill*, ___ U.S. ___, ___, 114 S. Ct. 1878, 1888 [1994]; and *see Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 [1983]). *A fortiori*, such employee misconduct can be cause for the denial of unemployment insurance benefits.

The Claimant here argues a grand *non sequitur*, seeking to transmute the factual findings of his knowing and unjustified misconduct into the equivalent of the suppression of sincerely held religious beliefs. He evidently has now abandoned his earlier posture before the New York Court of Appeals, where he claimed "equivalence" to the discharge of a public employee for expressing his views on political issues. There, O'Connor had argued:

> "There is a constitutional case directly on point: *DeGrego v. Levine*" (39 N.Y.2d 180 [1976]).

In *DeGrego*, the New York Court of Appeals observed that the claimant did not provoke his discharge, and that there was no evidence to support the contention that his action was detrimental to the employer's interest or in violation of a

reasonable working condition so as to constitute misconduct (39 N.Y.2d at 194). Here, the opposite has been factually determined.

Throughout this case, O'Connor has shifted his claims (from "whistle blower" to a claimed analogy to a public sector employee discharged for his political views, to a claimed analogy to an individual penalized for his religious beliefs). He remains, however, simply a disgruntled employee whose actions were unjustified. The First Amendment is not a license to speak without consequences. RSS has a legitimate interest in ensuring that a fair and accurate picture of this private agency is put forth by its employees, in order to protect its clients from adverse community reaction. Here, O'Connor willfully disregarded the established media statements policy and disseminated inaccurate and disparaging information about RSS due to his pique regarding his lack of compensation (A. 7).

Claimant's position is not remotely like *DeGrego v. Levine* (46 A.D.2d 253 [3d Dept. 1974], *aff'd oth. gr.* 39 N.Y.2d 180 [1976]), and *Pickering v. Board of Education* (391 U.S. 563, 88 S. Ct. 173 [1968]), involving the discharge of a governmental employee for his views on political issues, or the religious freedom cases cited on appeal (*Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 [1963]; *Thomas v. Review Board of the Indiana Unemployment Security Div.*, 450 U.S. 707, 101 S. Ct. 1425 [1981]; *Hobbie v. Unemployment Insurance Appeals Com'n of Florida*, 480 U.S. 136, 107 S. Ct. 1046 [1987] or *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 109 S. Ct. 1514 [1989]). None of these cases involves an unjustified and willful violation of a reasonable policy of a non-governmental employer. Nor do they involve an employee's

intentional dissemination of disparaging and inaccurate information about his employer, which in this case was self-evidently an unfair and incomplete portrayal.

In the instant case, RSS has reasonably applied a media relations policy to all agency employees, which policy serves the legitimate and substantial interests of the agency and its clients in dealing with public perception of the mentally ill. After hearing all the facts, it was conclusively determined below that O'Connor's actions were unjustified.

O'Connor voluntarily chose to forego the internal grievance procedure at RSS and, indeed, refused to cooperate in its investigation of this matter. Being motivated by specific concern over his "low salary" and having disregarded that three public agencies had investigated the underlying matter, but had not attributed fault to RSS, the conclusive fact finding of unjustified conduct was well supported by the record.

Unlike in the cases which he cites, O'Connor was not put to the choice of fidelity to sincerely held religious belief or cessation of work. The fact findings herein belie any claim of a comparable predicament. Instead, O'Connor seeks to "expand" such holdings (Petition, p. 4) to allow employee speech with impunity, notwithstanding a detrimental impact upon legitimate employer interests. The unemployment insurance laws were not designed to force employers to pay benefits to employees who have willfully transgressed reasonable employer policies and thereby adversely affected legitimate employer interests. O'Connor's personal desire to instigate adverse public comment regarding his employer was recognized below to be unjustified in the prevailing circumstances.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: April 21, 1995

Respectfully submitted,

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